No. 95-1201

In The

Supreme Court of the United States

October Term, 1996

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,

Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *et al.*,

Appellees,

and

STEPHEN A. SILLMAN,

Intervenor-Appellee.

On Appeal From The United States District Court
For The Northern District Of California

APPELLEE STATE'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. WHETHER INJUNCTIVE RELIEF IS REQUIRED IN A SECTION 5 ACTION ABSENT ANY FINDINGS OF RETROGRESSION OR DISCRIMINATION AND BEFORE THE COURT HAS ADDRESSED THE POSSIBLE MOOTNESS OF PRECLEARANCE VIOLATIONS THAT OCCURRED 8-20 YEARS BEFORE.

2. WHETHER A RACE-BASED DISCRIMINATORY DISTRICTING PLAN MAY BE ORDERED OR PERPETUATED AS A "REMEDY" IN A SECTION 5 ACTION WHEN NO HARM HAS BEEN IDENTIFIED AND WHEN THE PLAN IS UNRELATED TO STATUS QUO CONDITIONS.

3. WHETHER, IN A SECTION 5 ACTION AGAINST A COUNTY, THE DISTRICT COURT IS PRECLUDED FROM EXERCISING ITS EQUITABLE REMEDIAL DISCRETION TO ORDER A RACE-NEUTRAL ELECTION PLAN THAT IS CONSISTENT WITH STATE LAWS, STATE PRACTICE, AND THE FOURTEENTH AMENDMENT, MERELY BECAUSE THE COURT'S PLAN CORRESPONDS TO THE CHALLENGED ELECTORAL SYSTEM FORMERLY ADMINISTERED BY THE COUNTY.

4. WHETHER THE TENTH AMENDMENT PERMITS IMPOSITION OF SECTION 5 PRECLEARANCE REQUIREMENTS BASED SOLELY ON LOW VOTER TURNOUT, WHERE NO HISTORY OF DISCRIMINATION IS SHOWN AND WHERE VOTER TURNOUT MAY BE ATTRIBUTABLE TO RACE-NEUTRAL FACTORS.

QUESTIONS PRESENTED – Continued

5. WHETHER THE MERE MERGING AND/OR REDRAWING OF NON-EQUIPOPULOUS JUDICIAL DISTRICTS, TAKEN ALONE, CONSTITUTES A VOTING STANDARD, PRACTICE, OR PROCEDURE SUBJECT TO SECTION 5 PRECLEARANCE.

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RELEVANT BACKGROUND FACTS[1]

The State of California has 58 counties, including defendant-appellee Monterey County (hereinafter "Monterey" or "the County"). (Cal. Gov. Code, § 23012.) In 1968, a presidential election year, Monterey included within its boundaries a large and active federal military installation, the Fort Ord Army Base, which served as a vital central training and staging base for the United States' military operations in the Vietnam War. The Naval Post-Graduate School was also located in Monterey. In addition, the County contained an important and sizable state penitentiary, Soledad State Prison, which remains operational today. In 1968, this prison housed "several thousand convicted felons,"[2] and Fort Ord's population alone (32,723) accounted for almost one-sixth of the County's total population. (*See* County's Response to Appl. for Stay, at p. 2 and fn. 2; *see also* D.E. 30, Ex. A, p. 58 [17% of County's 1970 population resided on military bases].)[3]

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[1] Citations to the record will be in the following form, with page numbers: Joint Appendix: "J.A."; Appendix to Jurisdictional Statement: "J.S. Apx."; Appendix to State's Motion to Dismiss or Affirm: "State Apx."; Appendix to Judge Sillman's Motion to Dismiss or Affirm: "Sillman Apx." Appendix to this Brief: "Apx." Documents not included in the appendices will be cited by their docket entry ("D.E.") numbers. Appellants' Brief will be cited as "Lopez Brief."

[2] Under California law, state prisoners' voting rights are suspended during their incarceration. (Cal. Const., Art. II, § 4. *And see* former Cal. Penal Code § 2600; *Otsuka v. Hite*, 64 Cal.2d 596, 606 at fn. 5, 414 P.2d 412 (1966); *Ramirez v. Brown*, 9 Cal.3d 199, 217 at fn. 18, 507 P.2d 1345 (1973).) In 1990, Monterey's prison population was 5,996. (State Apx. 14a, 15a.)

[3] Armed Forces personnel are typically registered to vote in their home states rather than the states in which they are based during military service. (*Carrington v. Rash*, 380 U.S. 89, 99, 85 S.Ct. 775, 782 (1965), Harlan, J., dissenting [Assumption that servicemen from other States stationed in Texas "are to be

California's judicial system consists, principally, of the State Supreme Court; the Court of Appeal, with six appellate districts; the superior courts, with 58 districts matching county boundaries; the municipal courts; and (until eliminated by statewide initiative measure in 1994) the justice courts. (Cal.Const., Art. VI, §§ 1-5; Cal. Gov. Code §§ 68801 et seq.) The latter three courts are trial courts. Justice courts, however, were distinct in several respects: they were smaller, generally more rural tribunals; they were not courts of record; judges elected thereto were not required to be state bar members (70% were non-attorneys in 1971); and such judges typically worked only part time.[4] (Minteer, *Trial Court Consolidation in California*, 21 UCLA Law Review 1081, 1086 (1974); Cal. Gov. Code § 71601.) California law does not require that its state or county judicial districts be equipopulous, and they are not.

In 1968, in addition to its county superior court, Monterey's trial courts included two municipal court districts and seven justice court districts having very disparate sizes and populations. Using 1990 census figures, the resident populations of these independent judicial districts within the County ranged from a high of 146,858 (Salinas Municipal Court District) to a low of less than 3

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treated as transients for voting purposes" is accurate "in the vast majority of cases"]. *And see* "Voting Information 1964," Department of Defense, p. x, as quoted by the Court in *Carrington, supra*, 380 U.S. at 91, fn. 3 ["For voting purposes the legal residence of members of the Armed Forces is generally the State from which they entered military service"]; *Stanley v. Illinois*, 405 U.S. 645, 655, 92 S.Ct. 1208, 1215 (1972).)

[4] Proposition 91, approved by California voters in November 1988, amended Article VI sec. 1 of the Cal. Const. to treat justice courts as courts of record beginning January 1, 1990. It also required judges thereof to work full-time and to meet the same minimum qualifications as municipal court judges. (*See also* Cal. Gov. Code § 71701 [justice court vacancies must be filled by attorney-judges beginning January 1975].)

percent of that figure: 3,891 (San Ardo Justice Court District). (State Apx. 14a; Sillman Apx. 49a-50a.) Judges for each of the County's municipal and justice court districts were elected only by the voters of their respective districts and, once elected, presided over only the judicial districts in which they were elected. (E.g., J.A. 129, fn. 3; D.E. 30, Ex. A, at 55-80.)[5] Judges' caseloads also varied greatly according to their judicial districts; the several small rural justice court districts, which actually functioned primarily as traffic courts,[6] had insufficient workloads to justify even a half-time judge, while judges in the

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[5] The United States misrepresents the operation of the County's municipal and justice courts in 1968, describing the "electoral changes" here at issue as "consolidation ordinances that transformed the *County's system of electing municipal judges from a nine-district system* to an at-large system . . . " (U.S. Brief at 14; emphasis added.) As the record makes clear, the 1968 system was *not* a single municipal court with nine electoral divisions; it did not even approximate such a system. Rather, there were seven small independently administered justice court districts – which were not courts of record and whose voters had no say whatsoever in municipal court elections – and there were two separate and independent municipal court districts, the judges of which sat only in the district from which they were elected. (E.g., J.A. 129, fn. 3; D.E. 30, Ex. A, at 55-80.) Each municipal court district had two judges; however, those judges did not "represent" electoral divisions within the district, but *were elected by at-large, district-wide vote.* (Appellants, too, describe the 1968 system using unnecessarily misleading language, and they falsely equate justice and municipal court judgeships. [E.g. Lopez Brief at 3 ("election districts") and 7.]) Further, it should be noted that, in the 1968 *municipal court districts*, Latino voters were not even close to a majority; even using 1990 census figures (which inflate their percentages), Latinos made up only 23 percent of one municipal court district (Salinas) and a mere 6 percent of the other municipal court district (Monterey-Carmel). (State Apx. 14a.)

[6] The 1972 Judicial Council study shows traffic violations accounting for 80 to 94 percent of the seven justice courts' nonparking filings: Castroville-Pajaro, 92%; Pacific Grove, 80%;

larger municipal court districts were relatively overworked. (*See* D.E. 30, Ex. A, pp. 59-71.)[7] The system was widely criticized as wasteful, inefficient, and inequitable. Commentators and experts – including the Chief Justice of the state Supreme Court and the Judicial Council of California, called for consolidation of the districts into a simpler, more practical, and more equitable model: namely, a single, centrally administered, countywide municipal court. (*See* D.E. 30, Ex. A, pp. 55-80; Minteer, *supra; and see* J.A. 48-49.)[8]

The ratios of minority populations in Monterey also varied from district to district. A projection of 1990 census data on these 1968 judicial districts suggests that, with respect to adult (age 18 and older) citizens, Latinos may have constituted a majority in three of the very small justice court districts: the Gonzales district (54%); the Greenfield district (51%); and – if the prison population is excluded – the Soledad district (62%).[9] If so, these were

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Gonzales, 91%; Soledad, 83%; Greenfield, 90%; King City, 92%; and San Ardo, 94%. (*See* D.E. 30, Ex. A, p. 75 and fn. 5.)

[7] According to the Judicial Council's 1972 study, the County's two municipal court districts, with two judges each, had "workload equivalents" justifying 2.0 (Salinas) and 2.3 (Monterey-Carmel) judicial positions. In contrast, the County's seven justice court districts had the following "workload equivalents," totalling 1.5 positions overall: Castroville-Pajaro, .5; Pacific Grove, .2; Gonzales, .1; Soledad, .2; Greenfield, .1; King City, .2; and San Ardo, .2. (*See* D.E. 30, Ex. A, pp. 59-71.)

[8] The Judicial Council was directed by statute to conduct surveys of the operations of the courts and to make recommendations concerning possible consolidation or other modification " . . . with a view toward creating a greater number of full-time judicial offices, equalizing the work of the judges, expediting judicial business, and improving the administration of justice." (Cal. Gov. Code § 71042.)

[9] Note that use of 1990 census data in this manner necessarily results in inflated figures for the 1968 minority populations since, as appellants have emphasized, the

"majority-minority" electoral districts in which Latino voters had the voting strength to elect the part-time justice court judge who presided over each small district. However, the total combined adult populations of these three "majority-minority" districts constituted only 6.6% of the County's overall adult population (State Apx. 14a; Sillman Apx. 49a-50a.) (In contrast, the combined adult populations of the two municipal court districts, in which Latinos made up only 6% [Monterey-Carmel] and 23% [Salinas] of the respective adult citizen populations, constituted over 73% of the County's total adults. (*Ibid.*)) And the total combined workload for the three justice court districts (.4) equated to less than half of a judicial position. (*See* fn. 7, *ante.*) Voters residing in the small justice court districts had no vote whatsoever in the larger municipal court districts, of which they were not a part.

Beginning in 1894, California's Constitution included a provision – effective as to all 58 of the State's counties – that imposed a literacy requirement for voters. (Cal.Const., former Art. II, sec. 1.)[10] This literacy test was challenged in a 1967 lawsuit brought in state court, however, and the test was ultimately rejected and banned as unconstitutional by the state Supreme Court in March 1970. (*Castro v. State of California*, 2 Cal.3d 223 (1970).) (Later, on June 22, 1970, the Voting Rights Act ("VRA") was amended to also ban such literacy tests outright. *See* 42 U.S.C. § 1973aa; Pub. L. 89-110; *and see, generally, Oregon v. Mitchell*, 400 U.S. 112 (1970); *cf. Castro*, 2 Cal.3d at 231-232, fn. 15.) California's test was formally repealed

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population of Latinos in Monterey County has dramatically increased relative to non-Latinos since 1980. (Lopez Brief at 5; J.S. Apx. 94, ¶ 4.)

[10] Former Article II, section 1 provided, in pertinent part, that " . . . no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State: . . . " (*Castro v. State of California*, 2 Cal.3d 223, 225 (1970).)

by the People at the statewide general election held on November 7, 1972.

In 1970, Monterey County became subject to federal "preclearance" requirements under Section 5 of the VRA. This status was imposed not because any voting practice in the County was shown to have had a discriminatory purpose or discriminatory effect, but rather merely by a mechanical application of Section 5 coverage standards to happenstance. Thus, the County became a "covered jurisdiction" under Section 5 "on and after August 6, 1970," only because (1) on November 1, 1968, the California Constitution still included the aforesaid statewide literacy test for voting (which, by August 1970, had been discontinued), and (2) the Census Bureau determined that fewer than 50% of the voting age residents in the County had voted in the November 1968 presidential election. (*See* 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed.Reg. 12354 (July 24, 1970); 36 Fed.Reg. (No. 60) 5809 (Mar. 27, 1971).) Of the remaining 57 California counties, only one other – Yuba County – was similarly deemed to be a covered jurisdiction at this time. (*Ibid.*) In 1990, Yuba County's population was 11.6 percent Hispanic. (*Cal. Statistical Abstract 1995*, p. 19, Table B-5.)

Between 1972 and 1983, Monterey promulgated a series of ordinances which, consistent with the Judicial Council's policy recommendations (D.E. 30, Ex. A, at 55-80), ultimately consolidated the County's seven, variously-sized, independent justice court districts and its two independent municipal court districts into a single, countywide municipal court.[11] The election system

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[11] The evolution of these consolidations may be briefly summarized: In 1972, Monterey County Ordinance No. 1852 was adopted, reducing the number of judicial districts from ten to nine; two municipal court districts and seven justice court districts. Ordinance No. 1917, adopted eight months later, reduced the number of districts to eight by merging the Soledad and Gonzales justice court districts. Thirteen months later, in

remained the same throughout this transition: that is, in the final countywide municipal court district, just as in Monterey's previous, smaller, independent judicial districts, every qualified voter within a given judicial district was entitled to vote in the election of every judge of that district.[12]

These ordinances were part of a consolidation effort that began in the early 1950's, when the County had 22 separate judicial districts (*Ibid.*), and reflected a statewide program that, between 1953 and 1990, reduced the total number of judicial districts in the State from 400 to 149. (D.E. 27, Ex. 1, p. 3.)[13] Although most of Monterey's

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1973, Ordinance No. 1999 was adopted, reducing the number of districts to seven by merging the King City and Greenfield justice court districts. In 1977, the San Ardo and King City-Greenfield justice court districts were consolidated by Ordinance No. 2139, which also merged the Pacific Grove justice court district into the Monterey-Carmel Municipal Court, leaving five judicial districts (four of which were later renamed). Two of these five were eliminated by Ordinance No. 2524, adopted in 1980, which merged the North Monterey Justice Court District, the Salinas Municipal Court District, and the Monterey Peninsula Municipal Court District into the Monterey County Municipal Court District. Finally, through adoption of Ordinance No. 2930 in 1983, the two remaining justice court districts ("Central" and "Southern") were merged into the municipal court to form a single judicial district, the Monterey County Municipal Court District. (D.E. 27, Ex. 2, pp. 1-3; *and see* J.A. 49.)

[12] The situation in 1972 represents the baseline, or "status quo," for Plaintiffs' Section 5 claim, and shall be referred to hereinafter, in the manner adopted by the district court, as "the 1968 plan." (*See* Lopez Brief 7; J.A. 29-33, 129 at fn. 3; State Apx. 14a; Sillman Apx. 49a-50a.)

[13] Consolidation of municipal and justice courts into single, centrally administered, countywide courts was quite common in California. By June 1983, 14 other counties had adopted countywide municipal court plans; at least three more counties had studies in progress. (D.E. 30, Ex. A, p. 52.)

consolidation ordinances were unprecleared when plaintiffs filed their complaint, the final ordinance – No. 2930 – had in fact been precleared. (U.S. Brief at 15-16, fn. 10.)

Meanwhile, the State of California – which is not a Section 5 covered jurisdiction – took several independent legislative actions affecting the number and configuration of municipal courts and justice courts in Monterey. In 1979, for example, the state Legislature *repealed* an earlier article relating to municipal courts in Monterey and declared the existence of a new municipal district. (Cal. Stats. 1979, ch. 694, § 1.)[14] The legislature subsequently amended that statute in 1989 (Cal. Stats. 1989, ch. 608), redefining the Monterey County Municipal Court District to be a single district encompassing the entire county. (Cal. Gov. Code § 73560.)[15] And in November 1994 the People of the State of California, through their initiative power, amended their state Constitution to altogether eliminate justice courts throughout the State. (*See* Cal. Const., art. IV, § 5 [as amended by Proposition 191].)

The State's Constitution and statutes also contain many provisions governing the general administration and organization of the State's courts, including municipal courts and, before they were abolished, justice courts. (*See, e.g.*, Cal. Gov. Code §§ 71001 et seq., 72000 et seq.) Among these are requirements that municipal court districts include at least 40,000 residents (Cal. Const. art. VI,

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[14] Section 1 of chapter 694 of the Statutes of 1979 provided:

> There is in the County of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court.

[15] Former Cal. Const., art. VI, § 5(a) provided, inter alia, that "[t]he Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts."

sec. 5(a)); that cities not be split into more than one district (*Ibid.*); that judges' jurisdictional bases and electoral bases be coterminous (Cal. Const. art. VI, sec. 16(b); *and see Koski v. James*, 47 Cal.App.3d 349, 354 (1975)); and that municipal court judges be residents of the judicial districts to which they are elected or appointed. (Cal. Gov. Code § 71140.)

With its consolidated, countywide municipal court district in place, the County conducted at-large municipal court judicial elections in 1986, in 1988, and again in 1990. Before that, of course, it also conducted judicial elections for various interim consolidated judicial districts in 1974, in 1976, in 1978, and in 1982. During this period, none of the County's consolidation ordinances was subjected to a VRA challenge.

PROCEDURAL HISTORY OF THE CASE

On September 6, 1991, Plaintiffs, five Latino voters residing in the County, brought this action against Monterey under Section 5 of the VRA (42 U.S.C. § 1973c), alleging only that Defendant County had committed a violation of Section 5 by neglecting to obtain "preclearance" before implementing the series of historic county ordinances – *promulgated between 1972 and 1983* – consolidating the County's variously-sized municipal court and justice court districts into a single county-wide municipal court district. (J.A. 27-35.)[16]

On March 31, 1993, after hearing cross-motions for summary judgment, the three-judge district court held that the challenged historical ordinances – some of which were adopted more than 20 years before – "could not be implemented" in the absence of preclearance. (J.A. 47-59.) The court also denied the County's motion to name the State as an indispensable party defendant (*Id.* at 52), an

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[16] Monterey did not raise either a laches defense or a statute of limitations defense to plaintiffs' action.

order which the court would later vacate and reverse in November 1995. (J.A. 173.)

Pursuant to the court's directive (*see* J.A. 59), Monterey then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking to have the challenged ordinances precleared after the fact. (*County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993).) At that point, however, the parties ceased to litigate the case as adversaries.[17] Before the D.C. court made any findings, the County abandoned its preclearance effort, voluntarily dismissing its action through a stipulation with the plaintiffs herein. Monterey stipulated that its Board of Supervisors was "unable to establish that the [consolidation ordinances] . . . did not have the effect of denying the right to vote to Latinos . . . " (J.A. 126.)

Defendant and Plaintiffs began to proceed by stipulation in the instant case as well. The County and Appellants twice submitted stipulations to the court below, asking the court to authorize proffered "remedial" election plans notwithstanding the fact that the unprecedented "electoral divisions" and methodologies devised therein would have violated controlling provisions of state statutes and of the California Constitution. (Sillman

[17] As County Counsel explained it to the court, Monterey sought to resolve the lawsuit and to "shortcut" the remedial process "to hopefully avoid some of the very, what we thought, egregious types of remedies that the plaintiffs were offering or suggesting." (D.E. No. 161 at 19-20.) By cooperating with Appellants and abandoning its consolidation ordinances, Monterey also sought to minimize its exposure to liability for Appellants' attorney fees. (*See* Apx. 1a-3a [parties' October 1993 "Memorandum of Agreement"].)

Apx. 3a-19a; J.A. 131-132)[18] At that point, the State of California intervened and objected to these proposed plans, arguing that neither Plaintiffs nor the County had shown any necessity for the court to override state law. (J.A. 60-68, 76-85.)[19] The court agreed, rejecting the parties' first and second stipulations and declining to order an election. Monterey was directed to devise and to submit for preclearance an election plan that complied both with the VRA and with all applicable provisions of the state Constitution and state law. (J.A. 91.)

Instead, Monterey joined Plaintiffs in filing yet another stipulation, this time purporting to show why the County "was unable" to submit an election plan consistent with the court's order. (J.S. Apx. 92-108.)[20] On June 1,

[18] In these stipulations, Plaintiffs admitted finding no evidence of discriminatory motive or purpose in the County's adoption of the challenged historic ordinances:

> Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act.

(*See* Sillman Apx. at 4a, ¶ 3; 12a, ¶ 3. *See also* the court's November 1, 1995 order (J.A. 167) ["Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances"].)

[19] The State also objected on the ground that the proposed racially drawn "electoral divisions" violated the Equal Protection Clause of the Fourteenth Amendment. (J.A. 115-120.)

[20] Most of the "facts" asserted in this stipulation, while perhaps relevant in a Section 2 action, had no bearing on the court's limited inquiry in this Section 5 action. (*See* J.S. Apx. 92-108; *Bossier Parish School Board v. Reno*, 907 F.Supp. 434, 445 (D.D.C. 1995).) In any event, as the State pointed out in response, the stipulation was insufficient to warrant suspension

1994, the court enjoined Monterey from holding municipal court elections pending adoption and preclearance of an appropriate plan (J.A. 103-110): "The court wishes to underscore the urgency with which it views Monterey County's responsibility to develop and preclear a plan that complies with state and federal law." (*Id.* at 108.) The County did not develop such a plan.

On December 20, 1994, the court, frustrated with the County's failure to present and to preclear an adequate plan, and mindful of the delays experienced by voters, determined " . . . that [the court's] remedy must allow for an election pending implementation of a permanent legislative solution." (J.A. 129-130.)[21] Under the court's one-time, emergency, December 1994 order, the municipal court remained a single countywide district for jurisdictional and administrative purposes, with judges thereof sitting over the entire county. However, for election purposes, this single district was divided into four discrete race-based "electoral divisions," with no requirement that judicial candidates reside in the sub-district in which they stood for election. Voters in one "division" of the district were not permitted to vote for judicial positions assigned to other "divisions." (J.A. 124-127; *and see* Sillman Apx. 13a-14a.) Judges' terms under this scheme were shortened by the court to expire on the first Monday in January 1997.

This one-time election plan, though it generally coincided with the scheme proposed in the parties' second stipulation and previously rejected by the court, *"[was] not being implemented as a legislative solution* to the existing

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of state law even if the assertions therein were taken as true. (J.A. 93.) The State further objected that the County, by entering this stipulation, had improperly purported to determine disputed and unresolved questions of law to the detriment of the State and itself. (*Id.*)

[21] The district court's Dec. 20, 1994 ruling (J.A. 123-137) is also published as *Lopez v. Monterey*, 871 F.Supp. 1254 (1994).

[VRA] problem facing the County, but *[was] rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges."* (J.A. 134, fn. 7; emphasis added.) The court viewed its order as an emergency measure which was to have no limiting or precedential effect on subsequent legislative plans: "[U]ltimately an at-large system . . . may prove, under the totality of circumstances, to be the best judicial election scheme." (*Id.* at 132.) The court emphasized this point repeatedly: "The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent plan. That judgment is best left to legislators." (*Id.* at 136, fn. 8.)

The court rejected the state's Equal Protection argument against racially drawn election divisions for want of judicial precedent supporting that theory: "The concern of the State . . . that an election area plan may violate the Equal Protection clause of the Fourteenth Amendment seems unfounded. *No case has been cited which comes to that conclusion."* (J.A. 135-136; emphasis added. *But see* this Court's recent opinions in *Miller, Shaw II,* and *Bush,* discussed *infra.*)[22]

Under the court's December 1994 plan,[23] Latino voters – who in 1968 were the majority in, at most, only three small independent justice court districts with part-time, locally elected judges who presided over only 7.5 percent of the County's population – now had majority voting power in explicitly race-based "divisions" encompassing more than 27 percent of the County population; and could now elect three full-time municipal court judges, each of whom sits on a countywide district and

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[22] Meanwhile, in early 1995, the Governor appointed three new judges – two Hispanics and an African-American – to existing vacancies on the municipal court.

[23] The County later conceded that the "electoral divisions" of this emergency December 1994 plan were exclusively race-based. (*See* Arg. III, *infra.*)

presides over 100 percent of the population. (State Apx. 14a, 15a; Sillman Apx. 50a, 52a.) The geographical configuration of the December 1994 majority-minority "divisions" was unrelated to the boundaries of the three 1968 justice court districts in which Latinos may have constituted a majority of eligible voters. (*Compare* maps, Sillman Apx. 49a [Soledad, Gonzales, and Greenfield] and 51a [Divisions 1, 2, and 3].)[24]

On June 29, 1995, this Court filed its decision in *Miller*, 115 S. Ct. 2475. In early September, the district court directed all parties to brief the impact of *Miller* for discussion at a status conference already calendared for the end of the month. (J.A. 163.) All members of the three-judge court were present at the status conference, where *Miller* was discussed extensively. In response to a pointed question from Judge Whyte, the County admitted that the "electoral divisions" employed by the court in its December 1994 emergency election order *were entirely race-generated*. (State Apx. 13a.)[25]

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[24] The election, held in 1995 pursuant to the court's emergency plan, resulted in the selection of an African-American judge and of two Latino judges, one who ran unopposed, and another who defeated an incumbent Latino judge theretofore appointed by the Governor. (*See* J.S. Apx. 111.) Ironically, this same racial mix of judges might well have been repeated under the scheduled 1996 *countywide* election, if this Court had not stayed that vote. Based on pre-election candidate declarations and, in one case, non-opposition *"it [was] certain* that the Municipal Court [would] have one African American judge and at least one Hispanic judge . . . and perhaps two." (*See* Sillman Response to Stay Application, at 18; emphasis added.)

[25] The State noted that no retrogression or discrimination had been found by any court in this matter, and that retrogression would be an elusive concept, in any event, due to enormous differences in population among the County's various 1968 justice court and municipal court districts. The State repeated its Equal Protection concerns, now supported by *Miller*, and urged the court to direct a countywide election. (D.E. No 161, pp. 4-12; 35-45.)

On November 1, 1995, the district court issued its interlocutory Order Modifying Injunction – the subject of this appeal. (J.A. 165-173.) The court observed that the validity of its previous emergency election order was at best questionable in light of this Court's decision in *Miller*: "The Supreme Court in [*Miller*] has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." (J.A. 167.) Noting that "*Miller* raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny," the court concluded "that it should allow a county-wide election of municipal court judges in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the [VRA] and state law." Judges elected in 1996 would serve normal, six-year terms. (*Ibid.*)

The court's election plan avoided several serious shortcomings inherent in the race-based December 1994 plan: it eliminated the kind of racial stereotyping criticized by this Court in *Miller*; it permitted each qualified voter in the judicial district to cast a vote for each judgeship therein; and it made each elected judge accountable to the entire population of his/her district rather than to only a discrete, racially defined "division" thereof:

> A county-wide election system does not assume that voters of a particular race or ethnicity will vote for the same candidates. It allows each voter one vote for each of the judicial offices. It makes the judges elected responsive to all citizens and avoids any risk of pressure on judges to respond to particular electoral constituents. *See, Nipper v. Smith*, 39 F.3d 1494, 1542-1547 (11th Cir. 1994) cert. denied, ___ U.S. ___, 115 S. Ct. 1795.

(J.A. 171.)

The court issued its modified injunction "[p]ursuant to its equitable power to effect a remedy" (*Id.* at 173),

observing that a return to the status quo would not be "legal, feasible or desired." (*Id.* at 167.) The court also declined to accept the parties' stipulation that Monterey was unable to establish that the historic consolidation ordinances did not have a retrogressive effect. (*Id.* at 167.)[26]

The court also ordered the State joined as an indispensable party defendant and reopened the threshold issue of Section 5 liability in the case, expressly inviting the State to seek dismissal of the action on grounds not heretofore considered:

> The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that 'in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire county,' (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

(J.A. 172; emphasis in original.)

[26] The court had previously rejected stipulations proffered by appellants and the County to suggest that the consolidation ordinances may have violated *Section 2* of the VRA. ((J.S. Apx. 92-108); J.A. 130, fn. 4.) To the extent that the district court may have appeared, in its previous orders, improperly to give weight or credence to proffered stipulations concerning "retrogression" or Section 2 "discrimination," it *reversed* itself in this respect in its November 1, 1995 order, holding that "this case is not a Section 2 case" and that, in light of *Miller*, "the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive . . . " (J.A. 172; *cf.* J.A. 106, 130 at fn. 4, 132.) Appellants concede this change in the court's position. (Lopez Brief at 33, fn. 24.)

SUMMARY OF ARGUMENT

In three recent opinions concerning States' congressional redistricting plans, this Court has addressed the propriety of imposing racially discriminatory districts as a remedy for VRA violations.

In *Miller*, Georgia complied with the demands of the U.S. Department of Justice ("DOJ") and the American Civil Liberties Union ("ACLU") to maximize minority voting strength by making race "the predominant, overriding factor" in configuring election districts. (*Id.* at 2484, 2489.) Applying a "strict scrutiny" test, this Court rejected the Georgia plan, holding (1) that the racial stereotyping and discrimination demanded by DOJ was not compelled under the VRA, notwithstanding Georgia's past discrimination and covered status, and (2) that Georgia's race-based reapportionment plan violated the Equal Protection guarantee of the Fourteenth Amendment, despite having been precleared by DOJ. (*Id.* at 2492-2494.)

In *Shaw II* (*Shaw v. Hunt*, ___ U.S. ___, 64 USLW 4437 (June 11, 1996)), the Court rejected a North Carolina race-based reapportionment plan, promoted and precleared by DOJ, because the plan's racial stereotyping was not narrowly tailored to serve a specific and compelling state interest as required under the Fourteenth Amendment, notwithstanding "the sorry history of race relations in North Carolina" (*Id.* at 4440, fn.4) and the state's professed desire to avoid litigation and liability under Sections 2 and 5 of the VRA.

And in *Bush* (*Bush v. Vera*, ___ U.S. ___, 64 USLW 4452 (June 11, 1996)), DOJ had precleared a Texas plan that sought to maximize minority voting strength by subordinating traditional districting criteria in favor of race. Again, this Court subjected the plan to strict scrutiny and rejected it as violative of the Fourteenth Amendment,

notwithstanding Texas' long history of discrimination. The Court held that race-based remedies are not justified absent a showing that they are necessary to neutralize specific, identified discrimination. (*Id.* at 4461.) The Court further held that Section 5 seeks only to *maintain* pre-existing minority voting strength, and cannot be used to justify the "substantial augmentation" thereof. (*Ibid.*)

The principles announced in *Miller*, *Shaw II*, and *Bush* control here, where Appellants urge the Court to endorse a racially discriminatory districting plan – this time without any showing of injury, much less of necessity. Further, the context of the "districting" question here makes those principles even more compelling: Here, the election system at issue is not a traditional or required districting plan for legislative representatives charged with responsibility to promote the interests of their constituents, but a *municipal court structure* for state court judges sworn to be impartial. Here, due to the passage of time and to intervening state laws, the district court may yet determine that Section 5 preclearance requirements are not even implicated in the current judicial election scheme. Here, the very election system advocated by Appellants, DOJ, and the ACLU – the creation of new race-based "electoral divisions" *within* a judicial district – violates state law and is unprecedented in the County, which has heretofore had only district-wide elections. And here, there is no identified discrimination or retrogression – quantified or otherwise – requiring correction. Even if there were retrogression, the particular race-based plan advocated by Appellants, and endorsed by DOJ and the ACLU, bears no rational relationship to pre-consolidation minority voting strength, whether gauged by demographics or by geography, and it patently offends the Fourteenth Amendment.

Accordingly, the district court's careful, well reasoned November 1995 order, directing that an interim judicial election be conducted in a manner consistent with state law and with race-neutral principles, should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT REFUSE TO INTERVENE

Appellants and their *amici* do a great disservice to the district court by repeatedly mischaracterizing its November 1995 modified injunctive order as an "order to implement an election plan that has not been approved pursuant to Section 5" (Lopez Brief, p. 2); "dissolv[ing] an injunction that had prohibited Monterey County, a covered jurisdiction, from implementing an unprecleared, at-large voting plan" (ACLU Brief, p. 3); and "reinstat[ing] the County's unprecleared at-large plan" (U.S. Brief, p. 9).

The court's order was issued "[p]ursuant to [the court's] equitable power to effect a remedy." (J.A. 180.) "The order reflects *what the court believes is the appropriate temporary, equitable remedy* pending preclearance of a plan that complies with the [VRA] and does not violate state law." (J.A. 184.)[27] Indeed, the court took great pains to explain the many considerations and the careful reasoning that led to its conclusion. (*See* J.A. 166-173.)

Even if the court's plan could be characterized as "reinstating" the status quo that had existed for eight years before Plaintiffs filed this action, of course, that prior scheme is more accurately described as the *State's* plan – not the unprecleared plan of the County. State law had, since 1989, defined Monterey's Municipal Court as a single, countywide district (Cal. Gov. Code § 73560); the state Constitution had, in 1994, eliminated all justice courts (Cal. Const., Art. VI, § 5); and the single, countywide district is consistent with statewide policy (D.E.

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[27] *See also* Reporter's Transcript of 9/28/95 hearing, wherein Judge Sillman's counsel urged the court to "enter *its own* order for countywide elections," as distinguished from "go[ing] forward with elections under ordinances . . . found . . . to be un-precleared". (D.E. No. 161, p. 52; emphasis added.)

30, Ex. A, pp. 55-80; Minteer, *supra*; Cal. Gov. Code § 71042) and statewide practice (D.E. 30, Ex. A, p. 52). Long before the court issued its interim injunctive order in November 1995, the challenged county ordinances had been rendered irrelevant and moot by superseding state law. (*See* Arg. II C, *infra*.) California is not a "covered jurisdiction" under Section 5. And the covered jurisdiction – the County – no longer proposed a countywide plan in November 1995, but instead endorsed race-based "electoral divisions." (*See* Stipulations [Sillman Apx. 3a, 11a]; D.E. No. 161; Apx. 1a-3a.) Thus, it is quite inaccurate to describe *the court's* election order as acceding to or implementing *the County's* plan. The County joined Plaintiffs in *opposing* the court's plan. (D.E. 151, 152, 161.)

II. THE COURT HAD NO DUTY TO "REMEDY" DISCRIMINATION OR RETROGRESSION BECAUSE NONE WAS ESTABLISHED; NEITHER HAS A MATERIAL SECTION 5 VIOLATION YET BEEN FOUND

Appellants and their *amici* cite a host of cases standing for the proposition that, when the VRA has been violated, a district court is required to fashion a remedy that counteracts the "discrimination" and/or nullifies the "retrogression." (*See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *McDaniel v. Sanchez*, 452 U.S. 130, 148 (1981); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).)

The State has no quarrel with these laudable principles in the abstract. However, these general precepts have no relevance or application here, where the district court was not required to issue "remedial orders" *of any dimension*, because neither discrimination nor retrogression has been established. Indeed, the district court has not yet finally determined even the threshold question whether this case presents a material violation of the VRA. (See Arg. II C, *infra*.) Under these circumstances, the district court's November 1995 order is immune from Appellants' challenges, and must be affirmed.

A. No Discrimination Has Been Alleged or Proven

Plaintiffs' complaint alleges only that, long ago, Monterey committed a breach of Section 5 by implementing a series of ordinances between 1972 and 1983 without first preclearing them. Appellants have not alleged that the County violated Section 2 of the Act, or that county authorities engaged in any form of purposeful discrimination. To the contrary, Appellants have conceded that, to their knowledge, county authorities harbored *no* discriminatory motive or purpose in adopting the historic county ordinances that are challenged in this action. (*See* fn. 18, *ante*.)[28] Accordingly, the myriad "discrimination" cases cited by Appellants and their supporting *amici* – calling for courts to right egregious wrongs – are plainly beside the point, and may be readily distinguished on their facts alone.[29]

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[28] *See also* the November 1, 1995 order: "Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances." (J.A. 167.) Appellants' purported Section 2 evidence (J.S. Apx. 92-108), which would appear inconsistent with its stipulation, has no place in this proceeding in any event. (*See, e.g., Holder v. Hall*, 512 U.S. ___, 114 S.Ct. 2581, 2587 (1994) [mere fact that voting change must be precleared does not make the practice subject to Section 2 vote dilution challenge]; *Bossier*, 907 F.Supp. 434, 445 ["section 2 and its standards have no place in a section 5 preclearance action," and court "will not permit section 2 evidence to prove discriminatory purpose under section 5"]; *Miller*, at 2491 [mere assertions or stipulations that remedy is required are insufficient to justify racially based "remedial" plan].)

[29] Indeed, even this Court's recent decisions *overturning* "remedial" orders, *Miller, Shaw II*, and *Bush*, are distinguishable from this case in that the call for remedial relief was far more compelling there.

The only discrimination present in this case is the radical, race-based, December 1994 "remedial" plan that the district court properly rejected in November 1995.

B. No Retrogression Has Been Established

As appellants concede, the exclusive tribunal to determine whether challenged voting changes are "retrogressive" under the VRA is the United States District Court for the District of Columbia. (Lopez Brief 28-29, 40; 42 U.S.C. 1973c.)[30] It is undisputed that this designated tribunal has not ruled on retrogression or preclearance in the instant case.[31] Nevertheless Appellants argue that retrogression should be *presumed*, or should be *inferred* from vague stipulations and patently inaccurate statistical and demographic comparisons. (E.g. Lopez Brief 30, 40-41. *And see* U.S. Brief 12-18; ACLU Brief 8-12.) They are in error.

1. Appellants' Stipulation Does Not Establish Retrogression

The chief fact cited by Appellants to support their claim of retrogression is a stipulation that they entered into with the County. Pursuant to that stipulation, the County halted its effort to preclear the disputed ordinances and voluntarily dismissed its action for declaratory judgment in the district court for the District of

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[30] For Section 5 preclearance, the only relevant question is whether an enactment, assuming that it constitutes a change with respect to voting (*cf.* Arg.II(C)(4), *infra*), is "retrogressive" when compared to the previous electoral system. (*See Holder v. Hall, supra*, 114 S.Ct. at 2587, *and see Lockhart v. United States*, 460 U.S. 125, 129 n.3, 103 S.Ct. 998, 1001 n. 3 (1983).) And this adjudication can be made only by the District Court for the District of Columbia. (*Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971). 42 U.S.C. 1973c; 28 C.F.R. § 51.1)

[31] The court below likewise noted the absence of any finding of retrogression here. (J.A. 171-172.)

Columbia – without prejudice – before that court could make any findings concerning preclearance or the related issue of retrogression. (*County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993).) The stipulation included the following provision:

> The Board of Supervisors is unable to establish that the Municipal Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

(J.A. 126; *and see* Sillman Apx. 4a, ¶ 3.)

But this stipulation is, on its face, so vague and imprecise as to be meaningless. It demonstrates no retrogression, no cause, no measure, no quantification, no analysis. The mere fact that the Board deemed itself "unable to establish" something does not, of course, prove the opposite proposition.[32] And we are not told *why* the Board felt itself unable. Was it a problem of limited fiscal resources or personnel? Of inability to reach consensus? Neither does the stipulation tell us *which* of the ordinances, if any, was seen as posing a substantive problem, or why. (The reference to "several of these ordinances" is particularly mysterious; County Counsel later agreed that "some of these changes clearly didn't have a retrogressive effect . . . " (D.E. No. 161, p. 15).) It is not clear whether the Board even believed that retrogression had occurred; after all, the dismissal was *without prejudice*. If the Board did so believe, it neglected to identify the ordinance(s), or to explain the perceived problem, or to quantify the perceived retrogression, or even to

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[32] Even if it did, this would be a case in which there is no appropriate remedy (*See Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994) *cert. denied* ___ U.S. ___, 115 S.Ct. 1794 (1995) [no remedy ordered even where Section 2 violation established; *see also* Arg. IV, *infra*)

explain what it meant by the term "retrogressive effect." Its stipulation is far too conclusory and nebulous to support any tailored "remedial" response:

> Although we have not always provided precise guidelines on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose. (See *Miller, supra*, at ___ (slip op., at 21) ("[T]he judiciary retains an independent obligation . . . to ensure that the State's actions are narrowly tailored to achieve a compelling interest"); *Wygant*, 476 U.S., at 280 (opinion of Powell, J.) ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose") *id.*, at 278, n. 5 (opinion of Powell, J.) (race-based state action must be remedial); *Shaw I*, 509 U.S., at ___ (slip op., at 23) ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). Cf. *Missouri v. Jenkins*, 515 U.S. ___, 115 S.Ct. 2475 (1995) (slip op., at 16) (With regard to the remedial authority of a federal court: "the remedy must . . . be related to 'the *condition* alleged to offend the Constitution. . . . ' " and must be "*remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct' ").

(*Shaw II*, 64 USLW at 4442; emphasis the Court's.)

Even if the County's stipulation did not suffer from the foregoing flaws, it could not take the place of specified findings in a judgment from the district court for the

District of Columbia; the court below would still lack authority to adjudicate the question of retrogression. (42 U.S.C. 1973c; *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971).) Furthermore, mere concessions or stipulations cannot justify discriminatory "remedial" orders of the kind here promoted by Appellants and their *amici*:

> When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. [Citations omitted.]

(*Miller*, 115 S.Ct. at 2491; *and see* Arg. III D, *infra*.) Accordingly, the County's vague stipulation is immaterial to the issues and was properly rejected by the district court. (J.A. 171-172.) Retrogression, if any, remains to be established.[33]

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[33] The stipulation may also be a product of the County's own confusion about how retrogression might be defined and measured. This confusion, no doubt fed by Appellants' ardent and repeated comparison of "apples to oranges", is clearly evident in the example of "apparent retrogression" which Monterey described when, at the September 1995 hearing, the court inquired whether DOJ might be more likely to preclear the consolidation ordinances in light of *Miller*. County Counsel Douglas Holland noted that attorneys for DOJ (referred to in error as "intervenors") had "indicated a concern" that one specific ordinance could not be precleared because it combined two small justice court districts having Latino majorities – Gonzales and Soledad – into one larger justice court district which *retained* a Latino majority. (*See* State Apx. 14a; Sillman Apx. 50a.) Although Latino voting strength in this combined district remained sufficient to elect the judge who presided over that small merged area, Holland predicted that the County would "have a very difficult time showing that that was not retrogressive." Why? Simply because "[i]t lost one judge in that area." (D.E. No. 161 at 14-15.) Manifestly, no reasonable retrogression analysis could

2. Appellants' Deceptive "Apples-to-Oranges" Comparisons Show Nothing

To further bolster their claim of retrogression, the Appellants engage in a mechanistic contrasting of the numbers of judges elected from majority-minority districts currently and in 1968. In this approach, Appellants argue that the 1968 plan had three judges (of 11 total judges) elected from majority-minority districts, while a countywide scheme has none. In this "analysis," Appellants treat all judgeships as equal, regardless of the districts' respective populations or geographical sizes, or the respective caseloads of the judges, or their respective time-bases, or whether they were municipal or justice court judges. (E.g. Lopez Brief at 41.) Also downplayed, or lost altogether, in Appellants' "analysis" is the fact that *judges elected under the 1968 scheme did not sit on a countywide court*, but presided only in the discrete and independent judicial district in which they stood for election. (J.A. 129, fn 3; D.E. 30, Ex. A, 55-80.) In contrast, judges elected to the single consolidated municipal court from "electoral divisions" under the December 1994 race-based plan, *preside over the entire county* – even though their electorate may be only 10% of the County's total voting age population.[34]

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proceed in this "apples to oranges" fashion, blindly contrasting the "numbers of judges" without reference to district size, caseload, judge's time-base, type of court, or even changes in population proportions. Such "analysis," whether it is DOJ's or the County's or both, is patently specious. (*See* section 2, *infra*.) In fact, this early consolidation cited by the County merely merged two part-time judgeships having, respectively, the workload equivalents of 0.1 and 0.2 judgeships, into a single new judgeship with a workload equivalent of 0.3 judicial positions. (*See* fn. 7, *ante*.)

[34] To be sure, locally elected municipal court judges may, under the state system, occasionally be assigned by the Chief Justice of the state Supreme Court to sit in other districts within or outside their counties as needed. (*See* J.A. 134-135.) However, no party has suggested that such short-term assignments are made based on the *racial composition of the judges' districts*, in the fashion contemplated under the December 1994 plan. And the State disputes that such temporary assignments may be viewed as diminishing the state interest in having judicial elections determined by all voters in the respective judicial districts.

Because it disregards these obvious and important distinctions and treats the districts as if they were equipopulous, Appellants' proffered comparison is utterly meaningless. By treating the San Ardo justice court district (pop. 3,891) as equivalent to a 1968 municipal court district with nearly 40 times the population (146,858), and to the current *countywide* judicial district with over 90 times the population (355,660), Appellants indulge in a flagrant form of statistical distortion. They compare "apples to oranges" or, more accurately, "*grapes to watermelons*," and it should be abundantly clear that such illogical and misleading numbers games are improper and probative of nothing at all. (*Cf. Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-655, 109 S.Ct. 2115, 2121-2123 (1989) [attempt to measure discrimination by simple comparison of employment numbers to population, without regard to job distinctions, qualifications, and interest, is "nonsensical"]; and see Huff, "*How to Lie With Statistics*," (Norton/1993).)[35] Thus, such comparisons would provide no credible evidence of retrogression even if the court below were authorized to decide that question.[36]

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[35] In its earlier rulings, the district court appears to have succumbed somewhat to the superficial appeal of Appellants' empty comparisons. (*See, e.g.* J.A. 54 [describing consolidation process simply as changing from "ten judicial election districts" to "one judicial election district"].)

[36] Using 1990 census data, which, as noted earlier, overstates the relative proportion of Latinos in 1968 (J.S. Apx. 94, ¶ 4), adult Latino citizens formed a majority in three small justice court districts: Gonzales (pop. 7,880); Greenfield (pop. 8,987); and Soledad (pop. 9,465 [excluding prison]). The

The normal legislative requirement of equipopulous electoral districts – a rule necessary for any rational determination whether voting rights are, in fact, equal – does not apply to judicial districts. (*Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973).) When judicial districts are not equipopulous, however, as was the case in Monterey in 1968, ascertainment of relative voting strengths and/or retrogression is necessarily complex and difficult, if not impossible. Indeed, this case, with its "apples to oranges" judicial districts, precisely illustrates the quandary anticipated by Justice Scalia in *Chisom v. Roemer*, 501 U.S. 380, 415, 111 S.Ct. 2354, 2375 (1991). (See Arg. II C 4, *infra*.)

C. The County's Section 5 Violations Have Not Yet Been Finally Determined to Be Material to Current Countywide Municipal Court Elections

1. Unresolved Mootness Issue

In arguing the need for a radical race-based "remedy" in this case, Appellants repeatedly stress that "a section 5 violation" has been found by the district court. (See, e.g., U.S. Brief at 16; ACLU Brief at 4; Lopez Brief at 18, 46.) But this representation does not tell the whole story, and the missing chapters are critical.

In March 1993, to be sure, the district court determined that the County, as a covered jurisdiction, violated

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combined population of these three majority-minority districts (26,332) constituted only 7.53 percent of the total county population (349,664 [excluding prison]), which means that 92.47 percent of the County's residents lived in judicial districts which were *not* majority-minority – even using 1990 census data. (State Apx. 14a; Sillman Apx. 50a.) Furthermore, if the three diminutive majority-minority justice court districts had been consolidated into a single district, the resulting combined population (26,332, using 1990 data) would have fallen far short of the minimum population (40,000) required for creation of a municipal court district. (*Id., and see* Cal. Const., Art. VI, § 5.)

Section 5 to the extent that it failed to preclear its historic consolidation ordinances between 1972 and 1983.[37] The State concedes that such failures, standing alone, would constitute technical violations, assuming arguendo that the mere merging or redrawing of unequally populated judicial districts is in fact a "voting change." (*See* Arg. II C 4, *infra*.) *The question remains, however, whether such violations are at all material to the County's present authority to conduct at-large elections*, given the long passage of time before Appellants filed their action and given intervening changes in state law during that period. These factors may well render the historical ordinances *altogether moot* at this point. The district court has not yet addressed these questions; however, the State – which was not made a party defendant until November 1995, has now raised both issues in its answer to the complaint. (State Apx. 28a-29a.) Furthermore, the district court has expressly acknowledged that these mootness issues may ultimately be dispositive of the case:

> The State appears to believe there has been no Section 5 violation *that affects the County's ability to hold county-wide judicial elections*. At this

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[37] *But see* U.S. Brief at 15-16, fn. 10 [conceding that County Ordinance No. 2930 *was* precleared]. *See also* DOJ's March 6, 1995 letter to Monterey County Counsel, where DOJ notes that, among the "voting changes for the municipal court of Monterey County, California" which were submitted to the Attorney General for preclearance – indeed, the first such submission listed – was: "1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships." DOJ then expressly states that "[t]he Attorney General does not interpose any objection to the *municipal court consolidation*, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship." (J.S. Apx. 54; emphasis added.) This DOJ preclearance, too, may render Plaintiffs' action moot, as asserted by the State. (State Apx. 28a-29a); the district court has not yet addressed the question.

> point the court is not persuaded by the State's position, but the State [as a newly added defendant] can now seek to show that the County is merely administering a state law calling for county-wide elections and, therefor, no preclearance requirement is involved.

(J.A. 166, fn. 2; emphasis added.) Viewed in this light, Appellants' challenge to the court's countywide election plan is meritless; any other remedial order would be premature.[38]

2. Unresolved Laches Issue

As Appellants and their *amici* admit, Section 5 of the VRA was intended primarily as a *prophylactic* measure, to prevent implementation of *new* voting changes by a covered jurisdiction – and to *maintain the status quo* – until preclearance has been obtained. (*See, e.g.*, U.S. Brief 10, 12 [Section 5 has "prophylactic purpose"; central purpose of preclearance is to establish "legality of new voting practices before they are implemented"]; *and see Bush*, 64 USLW at 4461.) Here, of course, Appellants rendered this congressionally intended prophylactic use of Section 5 *impossible* by waiting until late 1991 to challenge local ordinances effectuated one to two decades before, between 1972 and 1983. Appellants have offered no

[38] Indeed, at this early point in the proceedings, *any* remedial order is arguably premature. Because no *material violation* of Section 5 has yet been found, any order *preventing* countywide elections from going forward in 1996 *would have been an abuse of discretion*. (*See Miller*, at 2488 [federal courts' disruption of election schemes is "serious intrusion onto the most vital of local functions"].) The district court, having introduced a new defendant and having reopened the threshold liability issue, should have lifted its injunction altogether until a material Section 5 violation, if any, is established.

explanation for this inordinate delay,[39] the results of which are: a) the ordinances cannot, by a distance of 8 to 20 years, be enjoined "before" implementation; b) a return to the status quo is no longer feasible; and c) as noted in subsection 1, *ante*, subsequent changes in superseding state law have by now rendered moot Appellants' complaint about *ordinances*.

The State initially intervened in this case to assert and protect state interests in the remedial phase (J.A. 126), and was added as a party defendant on November 1, 1995. (J.A. 172-173.) In its recent answer to Appellants' complaint, the State has raised, inter alia, the defense of laches (State Apx. 28a) – an issue which the district court has not previously considered and which may prove dispositive.

3. Unresolved Tenth Amendment Issue: Application of Section 5 to Monterey County in the Present Circumstances is an Unwarranted Usurpation of Powers Reserved to the State

Furthermore, neither the district court nor any other tribunal has yet considered the constitutional propriety of Monterey's initial designation as a covered jurisdiction under Section 5. This Court is invited to do so. In *Miller*, this Court suggested that, absent strong evidence of discrimination, Congress' application of Section 5 restrictions and preclearance requirements to the States may

[39] The State acknowledges that Plaintiffs' complaint was not filed until after issuance of this Court's opinions in *Houston Lawyers Ass'n v. Texas*, 501 U.S. 419, 111 S.Ct. 2376 (1991) and *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354 (1991), clarifying that state judicial elections come within the ambit of the VRA. If prior uncertainty on this question excused Plaintiffs' failure to file their action when the challenged ordinances were promulgated, however, it must also excuse the County's failure to obtain preclearance.

well exceed Congress' power under Section 2 of the Fifteenth Amendment and tread impermissibly upon the powers reserved to the States under the Tenth Amendment. Thus, the Court noted that Section 5 "was directed at preventing a particular set of invidious practices which had the effect of 'undoing or defeating the rights recently won by nonwhite voters.' " (*Miller*, at 2493, quoting H.R.Rep. No. 91-397, p. 8 (1969).) The statute "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." (*Ibid.*, quoting from *Beer v. United States*, 425 U.S. 130, 140 (1976).) The Court observed that, notwithstanding the Tenth Amendment, "[i]n *Katzenbach*, 383 U.S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some states' 'extraordinary stratagems of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.' " (*See Miller*, at 2493.) In its next sentence, however, the Court indicated that the *interests of federalism* necessarily limit the extent to which Section 5 preclearance requirements may be justified:

> But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Thus, there is a real question whether the Tenth Amendment prohibits application of Section 5 preclearance requirements where, as here, there is *no predicate evidence of wrongdoing* by the targeted political subdivision.[40] If application of Section 5 preclearance were deemed unjustified or

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[40] As noted above, Monterey became a Section 5 jurisdiction only because, in 1968, it was subject to a statewide literacy test and its voter turnout for the presidential election was fewer than 50% of the County's voting age residents. No correlation was made between voter turnout and race, however,

doubtful in *Miller*, where there was a history of past discrimination in congressional districting (*Id.*, at 2483, *and see City of Rome v. United States*, 446 U.S. 156, 173-183 (1980),) then its application is certainly inappropriate, *a fortiori*, in the instant case, where there is neither discrimination nor retrogression.[41] Determinations of the "structure of government and

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and it is quite unlikely, that the test and the turnout were causally linked. California's literacy test was applicable throughout the State, yet only two of California's 58 counties were deemed "covered" as a result of the 1970 amendments to the Voting Rights Act: Monterey County and Yuba County. 36 Fed.Reg. (No. 60) 5809 (March 27, 1971). Hispanics constituted a significant percentage of the population in many other California counties: according to 1990 census figures, for example, Hispanics make up 26.6 percent of the population of Santa Barbara County; 33.3 percent of Colusa County; 33.6 percent of Monterey (but only 17 percent of Monterey's *voting age citizens* [State Apx. 14a, 15a]); 34.5 percent of Madera County; 37.8 percent of Los Angeles County; 45.8% of San Benito County; and 65.8 percent of Imperial County. (*California Statistical Abstract 1995* [Cal. Dept. of Finance], p. 19, Table B-5.) This would suggest that factors other than racial or ethnic discrimination (e.g., military bases, prisons, alienage, migratory patterns, etc.) may have accounted for calculation of a "low voter turnout" in Monterey. (*Cf., Apache County v. United States*, 256 F.Supp. 903, 909-910 (D.C.D.C. 1966)) – particularly since military bases and prisons accounted for more than one-sixth of the County's population at the time. (*See* County's Response to Appl. for Stay, at p. 2 and fn. 2; *see also* D.E. 30, Ex. A, p. 58 [17% of County's 1970 population resided on military bases].)

[41] Appellants miss the point in arguing that the United States' findings as to voter turnout and "device or test" may not be challenged in a Section 5 proceeding. (*See* Appellants' Reply to State Motion to Dismiss, 5-6; *and see Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428 (1977).) The State does not propose to dispute the *accuracy* of these federal findings, but rather their *sufficiency*. The State challenges whether, under the Tenth Amendment and in light of this Court's comments in *Miller*, such findings are sufficient, standing alone, to warrant federal usurpation of the sovereignty of the State or its political subdivisions. This

the character of those who exercise government authority," – such as the organization and reach of municipal and justice courts here – are, quintessentially, the prerogative of "the citizens of a sovereign State," protected by the Tenth Amendment. (*Gregory v. Ashcroft*, 501 U.S. 452, 460, 473 (1991); *and see New York v. United States*, 505 U.S. 144 (1992).) Section 5 should not be read or applied so expansively that it usurps this sovereign prerogative – particularly in the absence of discriminatory wrongdoing by the covered jurisdiction. (*Miller*, at 2493; *Katzenbach*, 383 U.S. at 326; *and see id.* at 358-360 [Black, J., concurring in part and dissenting in part].) Even if initial application of preclearance requirements to the County did not offend the Tenth Amendment, the imposition of a race-based *"remedial order"* – particularly an election plan violative of state law – would do so in the absence of Fifteenth Amendment predicate interests.[42]

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constitutional question may be raised in any proceeding. (*See Miller*, 115 S.Ct. at 2493 [Tenth Amendment may preclude application of Section 5 absent extraordinary circumstances present in *Katzenbach*.) In the circumstances of the present case, the State submits that the answer to this question must be a resounding "No." (*Cf. Seminole Tribe v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996).)

[42] Appellants and DOJ have elsewhere asserted the extreme and unsupported proposition that a sovereign *State*, though not itself a Section 5 covered jurisdiction, must nevertheless submit its newly enacted *state laws* to DOJ for preclearance to the extent they may affect election matters within a covered political subdivision such as Monterey. (See, e.g., Appellants' Reply to State Motion at 5.) But such an expansive and unwarranted application of the VRA to, essentially, extend a *rebuttable presumption of discriminatory purpose and/or effect* to uncovered state governments – whose laws must otherwise be *presumed to be valid* – would clearly violate the Tenth Amendment.

4. Unresolved Question Whether Court Consolidation Altered a Voting "Standard, Practice, or Procedure" Subject to Section 5 Preclearance

Finally, the State, as a new defendant, contends that the mere merging of several scattered and costly, independent, part-time justice court districts, and their gradual consolidation with larger existing courts of record, is not a "qualification, standard, practice, or procedure" within the meaning of Section 5 of the VRA. *There was no change in the manner in which judges are elected to a court*: that system – with each qualified voter in a judicial district having a vote for each vacant judgeship – has remained the same between 1968 and the present (except for the December 1994 race-based "division" plan). Rather, this was *a transformation and upgrading of the court itself – its nature, qualifications, jurisdictional scope, and administration* – as part of a statewide, race-neutral drive to improve judicial quality and efficiency while reducing costs. This transformation did not involve equipopulous *legislative* districts, but trial court districts with vastly different populations ranging from 3,891 in San Ardo to 146,858 in Salinas. (State Apx. 14a.)

Because the County's 1968 judicial districts were not equipopulous, the *true* relative voting strength of Hispanic and non-Hispanic voters within the county cannot be established. Without such a norm by which to measure what Latino voting strength *was or should have been* in 1968, as compared with Monterey's non-Hispanics, a *change* in district lines, *standing alone*, cannot be said to affect the "equality of voting rights" guaranteed by the VRA.[43] This analytical quandary has previously been the subject of discussion on the Court: When the "baseline" judicial districts are not even close to equipopulous,

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[43] This problem is compounded here because the 1968 system also involved two distinct *kinds* of courts: justice courts and municipal courts.

"[h]ow does one begin to decide . . . how much elective strength a minority bloc *ought* to have?" (*Chisom*, 501 U.S. at 415, 111 S.Ct. at 2375 (1991) (Scalia, J., dissenting; italics in original).) The VRA guarantees *equal* voting opportunities, without regard to race or ethnicity, yet "equality" is not susceptible of reasonable measure where districts are not equipopulous. (See "apples to oranges" discussion, *ante*.) The State submits, therefore, that the same valid factors which necessarily exempt judicial districts from requirements of equal population (*see Wells*, 347 F.Supp. 453, 454 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973).) must, necessarily, also exempt consolidations of judicial districts from VRA coverage as "voting practices."[44]

III. THE DISCRIMINATORY, RACE-BASED "REMEDY" ADVOCATED BY APPELLANTS IS PLAINLY UNCONSTITUTIONAL

Appellants argue that the district court overreacted to *Miller*, perceiving non-existent Fourteenth Amendment problems in the December 1994 emergency election order and giving undue credence to admissions by the County. They further assert that the race-based election divisions employed therein should pass constitutional muster because they were "narrowly tailored" to serve "a compelling state interest." These contentions are utterly meritless and disingenuous. If anything, the district court's challenged November 1995 order *understated* the glaring constitutional shortcomings evident in that 1994 election order.

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[44] On April 1, 1993, the district court concluded that the disputed ordinances "constitute a change in voting procedure different from that in force or effect on November 1, 1968." (J.A. 54.) In reaching that conclusion, however, the court did not consider the points here discussed, and the State, not then a party, has not yet had the opportunity to present its concerns and defenses on the subject.

A. Defendant County Admitted That Race Was The Exclusive or Predominant Consideration in Fashioning the "Election Divisions" Employed by the Court

As recounted in the Procedural Facts, *ante*, the district court directed the parties to "brief the effect of [*Miller*] on this case", indicating that this issue would be addressed at the scheduled September 28, 1995 status conference. (J.A. 163.) The resulting briefing focussed, to a great extent, on whether this Court's *Miller* opinion revealed flaws in the four-division election plan which had been approved by the County, proffered to the court, and used by the court to fashion its December 1994 emergency election order. (*See* D.E. Nos. 151-156.)

At the September 28 hearing, most of the comments by the court and the parties similarly addressed the question whether the December 1994 plan could withstand scrutiny in the light of *Miller*. Plaintiffs, Defendant County, and the Intervenors were all present, by and through their respective counsel, to argue their positions and to respond to questions from the court or other parties. Douglas Holland, Monterey County Counsel, was the County's representative. (D.E. No. 161, p. 2, *and see* p. 31 [Judge Whyte referring to Holland as "the County"].) In response to a specific question from Judge Whyte regarding whether and how *Miller* applied to the 1994 plan,[45] Holland admitted that the "electoral divisions"

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[45] The County's admission was preceded by the following exchange:

> JUDGE WHYTE: Do you feel the *Miller v. Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?
>
> MR. HOLLAND: No, I do not, Your Honor.
>
> JUDGE WHYTE: And the reason?

(State Apx. 13a.) The ACLU's portrayal of the County's admission as an "off-the-cuff description" which was "taken out of context" (ACLU Brief at 15) is thus starkly inaccurate.

were configured largely, if not exclusively, on the basis of race:

> I will be the first one to admit *the reasons for [–] the rationale for [–] the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations.* To the extent any other factor went in, it was entirely secondary. There's no question about that.

(State Apx. 13a; emphasis added.) With this explanation, the County answered affirmatively the threshold question posed in *Miller*: namely, whether, in crafting election districts, traditional race-neutral principles were subordinated to racial considerations. (*Id.* at 2490.) Accordingly, the plan cannot be upheld "unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." (*Ibid. And see Shaw II, Bush.*)[46] Immediately after the foregoing admission, the County proceeded with the remainder of its *Miller* analysis, arguing that the 1994 plan was narrowly tailored to a compelling interest: "But I think that it was also necessary in order to resolve a

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[46] Appellants cite this Court's summary affirmance of *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in relevant part and dismissed in part*, 115 S.Ct. 2637 (1995) for the proposition that race may be a significant factor in districting without triggering strict scrutiny of the plan. (Lopez Brief 31-32; *and see* ACLU Brief 14-15.) But their reliance is misplaced; the reasoning of the district court may not be attributed to the Supreme Court in this fashion: "I note that our summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment." (*Bush*, 64 USLW at 4465 [Kennedy, J., concurring]; and see *Id.* at 4466-4467 [Thomas, J., concurring].) In any event, here race plainly played a far stronger, more predominant role than it did in *DeWitt*; here, *"electoral divisions" would not have been contemplated at all but for the factor of race.*

particular problem that we were in at that time." (State Apx. 13a.)

Appellants and their *amici* struggle to downplay the significance of the Defendant County's concession in this regard.[47] But Mr. Holland was not in the courtroom at this *Miller* hearing to give his personal views; nor had he been pulled from the sidewalk at random for a "man-on-the-street" interview. Rather, he addressed the court in his role as the spokesman and legal representative of the Defendant County – the legislative body which had approved the proposed election divisions. Hence, his was *the County's* admission as to the basis for those divisions. (*Cf. Miller*, at 2489 [citing Georgia's concessions that normal districting standards were disregarded]; *Shaw II*, at 4439 [crediting North Carolina's concession that districts were deliberately created to assure black-voter majorities].) It is also significant that *Plaintiffs have never contradicted or challenged the County's characterization or admission.* (*See* D.E. No. 161, pp. 20-31, 55-56.)[48]

Furthermore, the County's admission was consistent with other evidence presented to the three-judge court showing subordination of traditional governing principles, including both testimony about purpose and tinkering for effect.[49] One clear and rather extraordinary

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[47] (*See*, e.g., ACLU Brief at 7 ["an *off-hand remark* of a County attorney"] and 15 [an *"off-the-cuff description"* which was *"taken out of context"*]; U.S. Brief at 9 ["[a] county attorney *expressed the view* . . . that the electoral districts . . . were drawn on the basis of race"]; Appellants' Brief at 31 ["County Counsel's statement at a status conference"].)

[48] Plaintiffs' only rebuttal is that they could have shown that the divisions were "compact." (*Lopez* Brief, p. 30 at 22.) This claim, even if true, is irrelevant if, as here, race was the *primary* consideration. (*Shaw II*, at 4441.)

[49] The court was informed of testimony from Ernesto Gonzalez concerning Monterey's *supervisorial* district 1, upon which the December 1994 judicial Electoral Division 1 was

indication that conventional districting principles were abandoned is the fact that it was not the County, but the *five Latino plaintiffs*, who prepared this "plan" and who dictated the configurations of two electoral divisions having Latino majorities of their adult citizen populations. This fact (overlooked in the briefs supporting appellants) is set forth in the County's December 29, 1994 letter to DOJ seeking preclearance of the court's December 1994 plan:

> We should point out that *the basic plan as adopted by the Board was originally prepared by [plaintiffs' attorney Joaquin] Avila on behalf of the plaintiffs. The boundaries of the Court Divisions 1 and 2 were entirely prepared at Mr. Avila's direction.*

(J.S. Apx. 36; emphasis added. *And see* J.S. Apx. 51, ¶ 1.2.2 [County may make minor adjustments to division boundary lines only "after consultation with legal counsel for the *Lopez* Plaintiffs"].) This Court may readily infer that Monterey's delegation – or abdication – of redistricting responsibilities in favor of a single special interest group of minority plaintiffs in this manner is inconsistent with customary government principles and practices.[50]

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largely modeled. Gonzalez, who was involved in designing supervisorial district 1, admitted that the district boundaries were chosen to *maximize* "the percentage of Hispanics in a district." (D.E. No. 154 at 7-8 and Ex. N, pp. 1662-1663.) In addition, Electoral Division 1 was modified – after the court's December 1994 order but before the election – to transfer a predominantly non-Hispanic census tract into Division 4. (*Ibid.*, and at Ex. N, pp. 1678-1681; Ex. E [map showing area as adjusted]; Ex. B [division map filed with the court]. *And see* D.E. No. 53 (Plaintiffs' Memo Supporting Second Stipulation) at pp. 11-12 [as condition of preclearance, DOJ would require that Electoral Division 1 divide City of Salinas and have Hispanic population above 64 percent].)

[50] Further corroborating evidence of the discriminatory intent driving the plan may be found in its provision that, in allocating judicial positions among the four race-based

Also telling is the fact that, geographically, the resulting 1994 majority-minority "electoral divisions" did not even pretend to coincide with, or even to approximate, the majority-minority justice court districts which existed in 1968 – the elimination of which is the claimed source of retrogression. (*See* Sillman Apx. 49a, 51a.) And the *demographics* of the December 1994 plan, taken alone, further support the court's finding. Divisions 1 and 2 are each 69% Latino (voting age), while Division 4 is only 16% Latino. (State Apx. 15a; Sillman Apx. 52a.)

B. Appellants Entirely Ignore the 1994 Plan's Grossly Prejudicial Effects, Which Provide Further Evidence of Discrimination and Subordination

The predominant role of race-based discrimination in formulating the December 1994 plan is also glaringly evident from the plan's discriminatory *effects*. (See *Bush*, 64 USLW at 4456 [actual election results may provide "inferential support" for finding of intent].) Putting aside the fact that no retrogression has yet been identified or quantified, the "electoral divisions" adopted by the County and jointly proffered to the court in the Parties' Second Stipulation were entirely unrelated to any restoration of the 1968 pre-consolidation situation – in which a Latino majority-minority voting status existed in, at most, only three small independent justice court districts constituting but 7.5% of the County's total population, and in which the elected part-time judges presided only over their respective districts. Instead, the December 1994 plan resulted in three large majority-minority "divisions," constituting 27.5% of the County's total population. These new divisions have an *average* population (31,957) that exceeds the *total* population of the three 1968 majority-

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"divisions," *vacancies* must first be allocated to "each division in which a racial or ethnic minority comprises at least a majority of the population in such division." (Sillman Apx. 17a, ¶ 4.)

minority districts (26,332), using 1990 data for both. More than that, the judges elected from these discrete race-based 1994 divisions are permitted to sit on a *countywide* court presiding over 100 percent of the County's population, notwithstanding that approximately 90% of the County's adult residents are denied any opportunity to vote in their respective elections. (State Apx. 14a, 15a.)

Further, as noted above, there is *no geographical similarity* between a) the December 1994 majority-minority "divisions" – whose very *raison d'être* is racial stereotyping – and b) the three small, rural, independent justice court districts which happened to be majority-minority in 1968. (*Compare* Sillman Apx. 49a, 51a.) As this Court clearly held in *Shaw II*, at 4442-4443, such an absence of geographical correspondence between prior identified "discriminatory areas" and "remedial districts" violates the Fourteenth Amendment.

By any measure, the radical changes effected by the December 1994 plan appear to be designed, like the plans rejected in *Miller* and *Shaw II*, to *arbitrarily and impermissibly maximize* the voting power of Latinos at the expense of other citizens rather than to restore the 1968 status quo. Such discrimination against non-Latinos within the County would be devoid of justification *even if* there had been a finding by the district court for the District of Columbia that intervening ordinances were somehow retrogressive. Any such remedies, to be constitutional, must be custom fitted, both numerically and geographically, to address a clearly identified harm: "Nonretrogression is not a license for the State to do whatever it deems necessary to insure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." (*Bush*, 64 USLW at 4461; *and see Shaw II*, 64 USLW at 4442, quoted *ante*.) Appellants' and DOJ's efforts here to exponentially increase minority voting strength in municipal court elections, without regard to status quo or harm, go far beyond the very limited goal of Section 5 "to insure that no voting-

procedure changes would be made that would lead to a retrogression in the position of racial minorities." (*Bush*, at 4461 [quoting *Miller* at 2493, quoting *Beer*, 425 U.S. at 141, 96 S.Ct. at 1363].)[51]

This statistical evidence of the plan's discriminatory effects was before the district court (*see* State Apx. 20a-21a at fn. 3; *and see* D.E. No. 161 at 35-39), and it powerfully supports the court's November 1995 order. Appellants make no mention of it whatsoever in their brief, however, and DOJ and the ACLU are similarly unwilling to confront these facts. Instead, all three shout from hiding that the 1994 plan is "narrowly tailored" to serve a "compelling interest."

C. The Race-Based Plan Patently Disregards Normal Principles Applicable to California Municipal Courts

As the district court itself noted, its December 1994 emergency election plan "suspended otherwise applicable provisions of state law". Specifically, the plan: a) "included districts that split the City of Salinas," in contravention of Article VI, Section 5 of the California Constitution; and b) provided that "a judge's jurisdictional and electoral bases [were not] coterminous," in contravention of Article VI, Section 16(b). (J.A. 131-132.) In addition, the plan created electoral districts having populations less than the 40,000 minimum population for municipal court districts (see State Apx. 15a; Cal. Const., Art. VI, § 5), and it did not require judicial candidates to be residents of the electoral division in which they stood

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[51] As in *Miller*, *Shaw II*, and *Bush*, the fact that DOJ willingly precleared the race-based plan in this case (J.S. Apx. 53-55) is reflective not of the plan's legitimacy, but of DOJ's distorted and abusive application of the VRA. "It takes a short-sighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." (*Miller* at 2494; *See also Shaw II*, at 4441.)

for election. (Sillman Apx. 18a, ¶ 7; Cal. Gov. Code § 71140. *And see* J.A. 60-68.) And, of course, the plan was designed by Plaintiffs rather than by county officials.

D. The Plan Serves No Compelling Purpose and is Not "Narrowly Tailored"

As discussed above, there is no finding of retrogression or discrimination in this case. There is only a technical failure of the County to preclear some of its historical ordinances between 1972 and 1983, but even that failure may yet be determined to be moot. Absent a clear finding of *identified, quantifiable* retrogression, there is no way to calculate the "amount" of remedy required, in any *newly devised* plan, to "right the (unidentified) wrong." (*See Bush*, at 4461 [problem that State seeks to remedy must be "specific, 'identified discrimination' "]; *Shaw II*, at 4442.)[52] In any event, the particular "remedy" endorsed by Appellants and their supporting *amici* here – the race-based December 1994 plan

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[52] Monterey apparently abandoned the defense of its consolidation ordinances in hopes of minimizing further litigation and containing its attorney fee liability. (D.E. No. 161 at 19-20; Apx. 1a-3a.) However, this goal cannot excuse or justify the County's failure to seek preclearance or to defend the Fourteenth Amendment rights of non-Latinos against DOJ's unwarranted demands:

> The dissent contends next that an 'acceptable reason for creating a second majority-minority district' was the 'State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection' under § 5 . . . If this were true, however, *Miller v. Johnson* would have been wrongly decided because there the Court rejected the contention that complying with the Justice Department's preclearance objection could be a compelling interest. *Miller, supra,* at ___ (slip op., at 20-21). *It necessarily follows that avoiding the litigation required to overcome the Department's objection could not be a compelling interest.*

(*Shaw II*, at 4440, fn. 4; emphasis added.)

imposing unprecedented "electoral divisions" – bears no relationship whatsoever to the plan in effect in 1968, and is anything but "narrowly tailored."

E. The Unconstitutional and Unenforceable December 1994 Plan Cannot Be A Voting Rights "Benchmark"

Appellants argue that the previous one-time emergency December 1994 race-based interim election order, with court-shortened terms, must be treated as the retrogression "benchmark" because it has been precleared by DOJ. This argument is absurd. For the reasons discussed above, and in light of this Court's decisions in *Miller*, *Shaw II*, and *Bush*, that December 1994 plan is patently unconstitutional. It could no more serve as a "Section 5 benchmark" than could the racially gerrymandered congressional districts in *Miller* and *Shaw II* which so offended the Fourteenth Amendment.[53]

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[53] Furthermore, the district court made it abundantly clear even in its December 1994 order that this interim election plan was to have no precedential effect upon future remedies – legislative or judicial. The court had *rejected* the Second Stipulation when it was offered as a legislative plan (J.A. 91), it expressly left open the possibility that a countywide plan might ultimately be deemed best (J.A. 132), it refused to "pass judgment on the merits of the proposed election area plan" (J.A. 136 at fn. 8), it specified extremely short terms for those elected under the plan, and it encouraged the County, in light of *Miller*, to submit its consolidation ordinances to DOJ for preclearance (D.E. No. 161 at 14). Thus, the court plainly had serious reservations about the propriety of this race-based plan even before this Court issued its *Miller* opinion, and the emergency "remedy" shares none of the attributes of the "benchmarks" found in appellants' cases. (*See, e.g., State of Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992) [ongoing state legislative redistricting plan carefully fashioned by court and specifically deemed to be "valid and equitable"]; *State of Mississippi v. Smith*, 541 F.Supp. 1329 (D.D.C. 1982) [reapportionment plan that court

The three-judge court's November 1995 ordering of a one-time countywide election for the consolidated municipal court was a proper exercise of the court's equitable discretion, consistent with applicable constitutional principles: a) the court's plan doesn't categorize voters by race or otherwise discriminate; b) there has been no claim that configuration of the County's boundaries violates the VRA or is unconstitutional; c) the district-wide election conforms with the State's Constitution and statutes, which are, to date, unchallenged in this case; d) the order preserves the vital impartiality of judicial offices; and e) the parties have stipulated that they are unable to propose any other plan which satisfies both state law and their view of the VRA. (Sillman Apx. 5a, 13a.)

Appellants assert various additional arguments against the court's November 1995 order, but none is persuasive. They argue that the better course was to extend the interim terms of the December 1994 plan, which is anomalous given that plan's unconstitutionality.[54] Appellants claim that the consolidated court fails accurately to reflect current minority voting strength, yet they propose giving 27% of the voting power to 17% of the qualified voting-age population. Retrogression is the Section 5 standard; proportionality, even in Section 2 cases, is not the standard for fairness (42 U.S.C. § 1973(b)), and maximization has been rejected by this Court.

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was confident had been necessary and valid for state compliance with VRA, and plan had been imposed by court for indefinite duration]; *State of Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979) [reapportionment plan which court and parties had developed, through long, painstaking process, and which court adopted per instructions from Supreme Court]. *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981), ["redistricting [which] is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation"].)

[54] Appellants' citation to *Brooks v. State Bd of Elections*, 790 F. Supp 1156 (S.D.Ga. 1990) is misguided; the judicial circuits and judicial offices there were not challenged as unconstitutional.

(*Miller, Shaw II, Johnson v. DeGrandy*, ___ U.S. ___, 114 S.Ct. 2647 (1994).) Appellants claim that this Court has stated a preference for "single member districts," but the Court has never stated such a preference *in the context of judicial elections*. And Appellants' claim that the district court was required to undertake a Section 2 analysis makes no sense: first, nobody has challenged the consolidated municipal court as violative of Section 2; and second, Section 2 analyses are not required in Section 5 cases. (*Bossier*, 907 F.Supp. 434, 445.)

IV. THE EXTREME CIRCUMSTANCES HERE WOULD JUSTIFY A THREE-JUDGE COURT'S REFUSAL TO ACT IN ANY EVENT

Appellants mischaracterize the district court's well reasoned November 1, 1995 injunctive order as a "refusal to enjoin unprecleared changes." (*See* Arg. I, *ante*.) Even if that characterization were accurate, however, affirmance would nevertheless be required in the unique circumstances of this case. In *Clark v. Roemer*, 500 U.S. 646, 654, 111 S.Ct. 2096, 2102 (1991), this Court declined to decide ". . . whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward." The Court did suggest, though, that it would be appropriate to permit implementation of such an unprecleared election change in "extreme circumstances." (*Ibid.*) The State submits that the exceptional and extreme conditions presented here would warrant such judicial inaction, regardless of how narrowly the Court may wish to define "extreme circumstances."

Conditions here include: (1) Plaintiffs' protracted, unexplained delay in bringing their Section 5 action;[55] (2) the

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[55] Courts may consider the undue passage of time as a factor in determining an appropriate temporary remedy. *Lopez v. Hale County, Texas*, 797 F.Supp. 547, 550-551 (N.D.Tex. 1992), *aff'd*, 113 S.Ct. 954 (1993).

absence of ascertainable or quantifiable harm; (3) the stipulated lack of discriminatory purpose underlying the historical consolidation ordinances; (4) the interlocutory, one-time nature of the injunctive order from which the appeal is taken; (5) the fact that "[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible, or desired." (J.S. Apx. 3; and see J.A. 129 and fn. 3); (6) the fact that Section 5 may have no application here because, in conducting its current judicial elections, the County may be administering state statutes and constitutional provisions rather than county ordinances; (7) the fact that the State has newly been added as a defendant and is free to raise new, potentially dispositive defenses on the merits of Appellants' claim; (8) the fact that Appellants have not challenged the configuration of Monterey County;[56] (9) the fact that the historical consolidation ordinances have never been determined to be retrogressive and that, because of extreme disparities in the 1968 districts' populations, such an analysis would be difficult if not impossible; (10) the possibility that the County's challenged ordinances may already have been precleared in March 1995; (11) the fact that the County became a covered jurisdiction through mechanical application of a statutory formula, with no finding of past discrimination; and (12) the fact that the previous race-based December 1994 plan is manifestly unconstitutional under *Miller*, *Shaw II*, and *Bush*. (*See* Arg. III, *ante*.)

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[56] As the district court observed in its November 1, 1995 order, municipal court judges *serve the entire county* (unlike the justice court and municipal court judges who, in 1968, were *elected* from smaller districts within the County *but also sat only in those smaller districts*), "and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power." (J.S. Apx. 6.) Furthermore, the California Constitution, Article VI, Section 16(b), reflects a state interest in having its judges' jurisdictional and electoral bases be coterminous. (*See also League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 n. 33 and accompanying text (5th Cir. 1993), *cert. denied*, 114 S.Ct. 878 (1993).)

V. IN WEIGHING SECTION 5 REMEDIES, COURTS MUST DISTINGUISH BETWEEN LEGISLATIVE AND JUDICIAL OFFICES

This case presents an issue not addressed by the Court in *Miller*, *Shaw II*, and *Bush*, which concerned race-based *congressional* districting: namely, whether Section 5 should be applied in the same manner to *judicial elections* as it is to elections of *legislative representatives*. It should not.

In the performance of their vital public function, judges are and must be governed by distinctly different principles than those guiding elected legislators. Judges do not "represent" the needs and interests of a particular constituency, but are called upon to weigh evidence and apply the law impartially and objectively in every case, without regard to the parties' race or residence or "electoral division." Their duty is to the entire community, and they should remain accountable to the entire community. A trial judge's decisions are not rendered through the majority vote of a board or commission or committee composed of partisans; rather, they are made by the judge alone, independently, acting in the interest of all. (*See League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 n. 33 and accompanying text (5th Cir. 1993), *cert. denied*, 114 S.Ct. 878 (1993); *Wells*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973).)

The subdivision of Monterey's municipal court into race-based electoral enclaves, as advocated by Appellants and by DOJ, ignores these fundamental distinctions between judges and legislators and undermines the integrity, respect, and independence so vital to the State's judicial system. Even in the context of legislative districting, this Court has pointed out that the objective of eradicating invidious discrimination " . . . is neither assured nor well served . . . by carving electorates into racial blocs." (*Miller* at 2494.) That admonition applies even more strongly here, in the context of judicial elections.[57] Courts are not legislatures, and this

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[57] Courts have recognized limitations on their authority to, in essence, redesign the system or form of state government as a remedy for Section 2 violations: "[f]ederal courts may

Court is urged to clarify whether and to what extent Section 5 constitutionally may be used by Plaintiffs and DOJ to obliterate the distinctions between these two branches of government.

CONCLUSION

For the reasons stated herein, this Court is respectfully urged to affirm the November 1, 1995 interlocutory injunctive order of the district court.

Dated: July 3, 1996

Respectfully submitted,

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not . . . alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.' " (*Nipper v. Smith, supra,* 39 F.3d at 1532, citing *Holder v. Hall,* 512 U.S. ___, 114 S.Ct. 2581, 2586 (1994).) Courts should exercise even more restraint when only a Section 5 violation is at stake, and still more when the challenged elections concern judicial rather than legislative positions.

INDEX TO APPENDIX TO BRIEF ON ITS MERITS

MEMORANDUM OF AGREEMENT

The Plaintiffs in *Vicky M. Lopez, et al., v. Monterey County, California,* Civ. Act. No. C-91-20559 WAI (EAI), the Defendants-Intervenors in *Monterey County v. United States of America,* Civ. No. 93-1639 (CRR) and Monterey County, California, to resolve any issues with respect to the award of attorneys fees, litigation expenses, and court costs, hereby stipulate to the following:

1. Monterey County shall pay to the order of Joaquin G. Avila, Esq., in full and complete discharge of all obligations to pay attorneys fees, expenses, and court costs incurred by or on behalf of the *Lopez* Plaintiffs and the *Lopez* Defendants-Intervenors, the sum of Two Hundred and Fifty Thousand Dollars ($ 250,000.00), subject to the following conditions:

   a. Monterey County and the Plaintiffs in the *Lopez* case and Defendants-Intervenors in the *Monterey County* case agree to the implementation of an election area plan consisting of at least seven election areas ("election area plan") for the election of Judges to the Monterey County Municipal Court District. The agreed upon election area plan shall be the operative plan for the election of municipal court judges as scheduled for 1994. This plan shall remain in effect at least through December 31, 1994.

   b. Upon the issuance of the Order described in paragraph c below, Monterey County will proceed to secure approval pursuant to Section 5 of the Voting Rights Act, of the election area plan, approved by the Plaintiffs and Defendants-Intervenors, for electing Judges

to the Monterey County Municipal Court District. Should Monterey County pursue a different remedy for electing Judges to the Monterey County Municipal Court District, other than an agreed upon election area plan for use in the 1994 municipal court elections, the attorneys representing the Plaintiffs in the *Lopez* case and the Defendants-Intervenors in the *Monterey County* case shall have the right to seek additional attorneys fees, expenses, costs, and court costs, for work incurred in successfully opposing the remedy sought to be implemented by Monterey County and for work incurred in successfully implementing an election area plan which meets the requirements of the Voting Rights Act.

c. Joaquin G. Avila, lead attorney for the Plaintiffs and Defendants-Intervenors, will assist Monterey County in securing approval of an agreed upon election area plan before the United States District Court for the Northern District of California in the *Lopez* case. Part of this assistance before the federal court in the *Lopez* case will consist of the preparation of a proposed stipulated Order and a Memorandum of Points and Authorities in support of the implementation of an election area plan for electing Judges to the Monterey County Municipal Court District. In addition, Mr. Avila will assist Monterey County in securing approval of an agreed upon election area plan either before the United States District Court for the District of Columbia or before the United States Attorney General pursuant to Section 5 of the Voting Rights Act.

2. Nothing in this Agreement shall be construed as prohibiting the County from considering and/or adopting any election area plan for the Municipal Court which would become effective on or after January 1, 1995, so long as such plan complies with the Voting Rights Act and is precleared in accordance with Section 5 of the Voting Rights Act.

IT IS SO AGREED

DATED: Oct. 4, 1993

/s/ Joaquin G. Avila
JOAQUIN G. AVILA
Attorney for *Lopez* Plaintiffs and Defendants-Intervenors

DATED: Oct. 5, 1993

/s/ Douglas C. Holland
DOUGLAS C. HOLLAND
Attorney for Monterey County